Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes:

MND, MNR, MNSD, FF

Introduction

This Dispute Resolution hearing was set to deal with an Application by the landlord for a monetary order for utilities owed and compensation for cleaning and damage to the unit. Both parties appeared and gave testimony.

Issue(s) to be Decided

The landlord was seeking a monetary order for damages and to retain the security deposit. The issue to be determined based on the testimony and the evidence is whether the landlord is entitled to monetary compensation under section 67 of the *Act* for damages or loss.

Background and Evidence

The landlord testified that the tenancy began on May 8, 2010. The rent was $2,000.00. A security deposit of $1,000.00 and pet damage deposit of $1,000.00 were paid. The landlord testified that, although there was no move-in condition inspection report completed at the start of the tenancy, a walk-through with the tenant was done and the unit was in pristine condition because it had been prepared to be listed for sale.

Submitted into evidence was a summary of the landlord's claim showing that the landlord is seeking compensation for the landlord's costs of $2,811.00 including $382.49 representing 50% of the taxes, pursuant to a term in the tenancy agreement, $179.20 representing 50% of the septic cleaning costs, pursuant to a term of the tenancy agreement, $1,244.00 for painting, $525.00 for cleaning and the $50.00 cost of filing the application. The landlord stated that the $430.42 claim for cleaning the carpets had been withdrawn as the tenants had proven that they had the carpets professionally cleaned. Therefore the claim was reduced to $2,380.58. Submitted into evidence, in support of the claim, was a copy of the tenancy agreement, a copy of the move-out condition inspection report, a number of photographs and copies of invoices and estimates.

The landlord testified that the expenditures for the taxes and the septic clean-out were proportionally charged to the tenant as these were both terms in the tenancy agreement to which the parties had freely agreed..

The landlord stated that, although the move-out inspection report failed to contain notations of the damage that is now being claimed, this oversight was due to the fact that the full extent of the damage and failure to clean was not discovered by the landlord until after the walk-through was done and report was completed on the afternoon of June 30, 2011.

The landlord testified that the tenant had damaged an area of wall in the kitchen, then removed the wallpaper and attempted to restore it by repainting the wall. However, according to the landlord, the repairs were insufficient, as verified by a contractor's notation on a document submitted into evidence by the landlord. The landlord testified that the tenant had merely painted over the old wallpaper. The landlord stated that, because one wall was missing the wall paper, she would have to re-paper or repaint the entire kitchen, in order to maintain the integrity of the décor. The landlord pointed out that an area under the desk had been stripped of part of the wallpaper that had not been repaired at all. In addition to the above, according to the landlord, the tenant had made several large holes in the wall of the bedroom that had to be filled and repainted. The landlord referred to photos in evidence and quotes from contractors with costs for removal all of the wallpaper in the kitchen and for preparing and painting 2 rooms, including the kitchen and the living room

The tenant disagreed with the landlord's allegations that the repairs completed on the kitchen wall were in any way deficient and denied that they had repainted over the wallpaper. The tenant stated that they removed the wall paper entirely on the damaged wall and went to the trouble of taking a sample of the wallpaper to the store to have it colour-matched, in order that the wall would be properly coordinated with the remainder of the room. The tenant did not agree that the loss of this wallpapered area would justify repapering the entire room as put forth by the landlord. The tenant pointed out that the landlord was also made aware of the damage to this wall when it occurred during the tenancy and she told them to go ahead and repair it, but gave no specific instructions or limitations, nor did she indicate that she wanted to arrange the repairs herself. With respect to the missing portion of wallpaper underneath the kitchen desk area, the tenant testified that this was the same state that the wall was in when they first took tenancy. The tenant pointed out that the landlord's failure to conduct a proper move-in inspection report had served to extinguish the landlord's right to claim against the security and pet damage deposits as provided in section 24 of the Act.

The landlord testified that the tenants had used fasteners to secure items to the wall of the bedroom and that this left some larger holes that had to be filled and the whole room had to be repainted. The landlord testified that touch-up painting was not possible as the room had originally been painted by professionals who did not leave any additional paint for future touch-ups.

The tenant disputed this claim and stated that the landlord had given the tenants permission to secure the items to the wall and made no mention of any requirement to fill the holes from the fasteners prior to leaving. The tenant testified that, had the landlord made any mention of this, they would have restored the wall.

The landlord was claiming cleaning costs of $525.00 and provided a copy of an invoice for this amount billing for 24 hours of cleaning conducted over 5 days. The landlord's witness stated that grime was found in areas that had not been properly cleaned and that the cleaning charges specifically pertained only to the cleaning done in the areas that the tenant had neglected. The landlord submitted close-up photos of several areas, including window ledges, screens, air vents, under and behind appliances, an overhead fan, the top of the refrigerator, the glass door of the woodstove, upper moulding on the wall and over the doorways and pieces of scotch tape found in areas.

The tenant did not agree that the unit was left in a dirty condition. The tenant testified that they hired professional cleaners to clean the home and it was returned to the landlord in a reasonably clean condition. The tenant pointed out that the move-out condition inspection report signed by both parties supports this position. The tenant also submitted written testimony from others attesting to the high standard of cleanliness that had been maintained during the tenancy and at the end of the tenancy. The tenant submitted a large number of 8-inch by 11-inch photographs of the rooms, including some close-ups, that appear to confirm a reasonable state of cleanliness including clean floors, appliances, fixtures, window ledges and cabinetry. .

Analysis

With respect to the landlord's claims for the tenant's portion of taxes and the septic clean-out agreed-to in the tenancy agreement, I find that these are terms in the tenancy agreement that the landlord is seeking to have enforced. Section 62 of the Act gives the dispute resolution officer authority to determine

> (a) disputes in relation to which the director has accepted an application for dispute resolution, and
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> (b) any matters related to that dispute that arise under the Act or a tenancy agreement. (my emphasis)

The dispute resolution officer may make any finding of fact or law that is necessary or incidental to making a decision or an order under the Act. And may make any order necessary to give effect to the rights, obligations and prohibitions under the Act, including an order that a landlord or tenant comply with the Act, the regulations or a tenancy agreement .

However, section 6(3) of the Act states that a term of a tenancy agreement is not enforceable if

(a) the term is inconsistent with this Act or the regulations,

(b) the term is unconscionable, or

(c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

Section 5 of the Act states that Landlords and tenants may not avoid or contract out of this Act or the regulations and that any attempt to avoid or contract out of this Act or the regulations is of no effect.

I find that a term in a tenancy agreement making the tenant's responsible for any portion of the landlord's taxes on the same property occupied by the landlord or other tenants would be an unclear term that is inconsistent with the Act and likely unconscionable. I also find it would be an unconscionable term in an agreement to make the tenant financially responsible or obliged in any way for the routine maintenance or repair of the septic system as a condition of tenancy. For this reason I find that the portion of the landlord's application relating to compensation for the the taxes and septic costs must be dismissed.

With respect to the other claims for cleaning, I find that it is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.

4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage

In this instance, the burden of proof is on the claimant, that being the landlord, to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the respondent.

I find that section 32 of the Act contains provisions regarding both the landlord's and the tenant's obligations to repair and maintain. A landlord must provide and maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law, and having regard to the age, character and location of the rental unit to make it suitable for occupation by a tenant. A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the residential property to which the tenant has access. While a tenant of a rental unit must repair damage to the rental unit caused by the actions or neglect of the tenant, this section of the Act specifies that a tenant is not required to make repairs for reasonable wear and tear.

Section 37 (2) of the Act states that when a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.

I find that the tenant's role in causing damage can normally be established by comparing the condition before the tenancy began with the condition of the unit after the tenancy ended. In other words, through the submission of completed copies of the move-in and move-out condition inspection reports featuring both party's signatures.

With respect to the move-in inspection, section (23(1) on the Act requires that the landlord and tenant together must inspect the condition of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day.

Both section 23(3), for move-in inspections, and section 35, for move-out inspections, state that the landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection and part 3 of the Regulations goes into significant detail about the specific obligations regarding how and when the Start-of-Tenancy and End-of-Tenancy Condition Inspections and Reports must be conducted.

In this situation, I find that the landlord failed to comply with the Act in regard to the statutory requirement to jointly conduct a move-in condition inspection, complete a report signed by both parties, and to give a copy to the tenant.

The evidence confirmed that the parties apparently intended to conduct a move-in inspection and, had it been pursued, this would require the parties to complete and sign

the move-in condition Inspection report. However, the parties both testified that no move-in condition inspection report was ever completed to record the start-of-tenancy condition of the rental unit.

I find the practice followed by this landlord in failing to conduct the start-of-tenancy condition inspection, was clearly a violation of the Act. I find that, pursuant to section 24 (2)(c) of the Act, the landlord therefore extinguished the landlord's right to make a claim against the tenant's security and pet damage deposits.

I find that the landlord did complete a move-out inspection report to verify the move-out condition. However, I find that the content of the move-out inspection report did not support all of the landlord's claims for cleaning and damage claimed in the landlord's application.

In any case, I find that, despite the fact that some areas in the unit that were apparently missed, the tenant did return the rental unit in a reasonably clean condition as required by the Act.

Based on the evidence, I find that the claims for monetary compensation by the landlord must be dismissed. It follows that the tenant's security deposit must be returned.

I find that section 38(6)(b) of the Act states that, within 15 days after the later of the day the tenancy ends, and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit or pet damage deposit to the tenant or make an application for dispute resolution claiming against the security deposit or pet damage deposit.

Section 38(6) provides that If a landlord does not comply with the Act by refunding the deposit owed or making application to retain it within 15 days, the landlord may not make a claim against the security deposit or any pet damage deposit, and must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

In this instance, I find that the landlord did make application to retain the deposit within 15 days.

On the question of whether or not the landlord's right to claim against the tenant's security and pet deposits was extinguished from the outset for failing to conduct a move-in inspection, I find that section 24(2)(c) of the Act states that the right of a landlord to claim against a security deposit, a pet damage deposit , or both , for damage to residential property is extinguished if the landlord does not complete a move-in inspection report and give the tenant a copy in accordance with the regulations.

As I have determined that the landlord did not complete a move-in inspection report, I find that the landlord's right to make a claim against the security or pet damage deposits for damage to the property was indeed extinguished.

That being said, I find that, under the Act, the landlord still had a right to file a claim to keep the security and pet damage deposits to satisfy monetary losses and debts, other than property damage, such as the landlord's failed attempt to seek compensation for taxes pursuant to specific terms in the tenancy agreement. For this reason, I find that the landlord's right to make an application to keep the security deposit was not completely extinguished by virtue of section 24(2)(c), and this application was clearly made within the 15-day deadline.

Accordingly I find that the landlord is not required to repay double the security and pet damage deposit under section 38(6)(2). The landlord must, however, refund the $1,000.00 security deposit and the $1,000.00 pet damage deposit to the tenants forthwith.

I find that, under the Act, and despite a term allocating interest in the tenancy agreement, no interest is granted on this deposit. I find that the percentage of interest, if any, is governed by the Residential Tenancy Regulation and, under the Regulation, no interest is payable for the period in question.

Conclusion

Based on the testimony and evidence I hereby dismiss the landlord's application in its entirety without leave to reapply.

I hereby grant a monetary order in favour of the tenant for $2,000.00. This order must be served on the landlord and may be enforced through Small Claims if not paid

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: October 13, 2011.

Residential Tenancy Branch